United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 8, 2003

TO : F. Rozier Sharp, Regional Director
Leonard P. Bernstein, Regional Attorney
Michael McConnell, Assistant to Regional Director
Region 17

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Otis Elevator Company,
Cases 17-CA-22052-3, 22059-3, 22063-3;
KONE, Inc., Case 17-CA-22068-3

This case was submitted for advice as to whether the Employers violated Section 8(a)(1) and (5) by unilaterally changing employees' above-scale wage rates during the term of the parties' current collective-bargaining agreements.

We conclude that the Employers did not violate Section 8(a)(1) and (5) by changing employees' above-scale wages because the Union waived its right to bargain over that subject.

FACTS

I. Background and the history of "plus pay"

Otis Elevator Company (Otis) and KONE, Incorporated (KONE), (Employers) have had a lengthy collective-bargaining relationship with International Union of Elevator Constructors (Union). Until 1987, the major employers in the industry bargained through the National Elevator Industry, Incorporated (NEII), a multi-employer bargaining association. In 1987, Otis left NEII in order to bargain separately with the Union for contracts that tracked, but were not identical to, the industry master contract.

The previous industry master contract expired on July 8, 2002. Prior to the 2002 negotiations, other major industry employers, including KONE, left the NEII and bargained separately with the Union during the 2002 negotiations. Bargaining eventually resulted in each of the major employers, including Otis and KONE, separately signing the current industry master agreement, effective July 9, 2002 to July 8, 2007.

The wage rates negotiated between the Union and industry employers have historically been considered contractual minimums. In practice, employees often receive

wages that exceed the contractual rate in a variety of situations. For instance, the current master agreement provides that employees who temporarily work as "temporary mechanics" or "mechanics in charge" receive an increase in their hourly wage rate while working in those positions.

In addition to this contractual provision, employees have historically received extra-contractual above-scale wages (plus pay) for a variety of reasons. For instance, many employees receive plus pay while they perform "adjuster work," because of the specialized skills involved. Employees may also receive plus pay pursuant to "local representative agreements," in which local management and Union locals negotiate moving expenses, as well as extra benefits and pay for employees who agree to work in service areas where the employer lacks a facility. Finally, employers often directly negotiate with employees to establish individual plus pay rates based on the employer's assessment of an employee's merit/performance, an employee's assignment to a particular job or job function, or in order to recruit and/or retain skilled employees. Despite the long existence of extra-contractual plus pay, it has never been included in the industry master agreement, nor has it resulted in any side agreements between the Union and industry employers. Although it is unclear exactly how many employees receive plus pay, the practice affects a substantial number of employees throughout the industry, including many working for the Employers.

There is evidence that employers have reduced or eliminated employees' extra-contractual plus pay in the past. For instance, in 2000-2001, the Union participated in a grievance filed by a Union Local against Otis' unilateral discontinuance of an employee's plus pay due to a change in the employee's job assignment. The grievance settlement resulted in part on an agreement by Otis to restore the employee's plus pay for a specified time period, and an agreement between the parties to establish a "mutually acceptable process for paying/changing wage rates (other than established scales), up or down, for future situations." Despite this settlement language, no bargaining took place over the issue of plus pay following the grievance.

II. 2002 Contract Negotiations

A. KONE

In May 2002,[1] prior to the 2002 negotiations, KONE sent the Union a letter stating that it intended to cease all

[1] All remaining dates are in 2002 unless noted.

plus pay payments to employees. Specifically, KONE's letter stated:

> You are advised that at the time of the expiration of the current Standard Agreement it is the intention of KONE Inc. to cease payment of all wage rates that exceed those specified in the Standard Agreement. Additionally, it is the intention of KONE Inc. to cease any payments that are not called for in the Standard Agreement, local agreements or established under prior practices. We would be pleased to meet with you to discuss this matter at any time prior to July 8, 2002.

The Union did not respond to KONE's letter.

KONE and the Union bargained from May 20-23, during which KONE agreed to sign the industry master agreement, which is silent on the issue of extra-contractual plus pay.[2] There is no evidence that the parties submitted proposals on the issue of extra-contractual plus pay during the 2002 negotiations or thereafter.

B. Otis

In November 2001, prior to the 2002 negotiations, Otis submitted a proposal to the Union which would establish a procedure for Otis to eliminate or reduce an employee's extra-contractual plus pay rate. Specifically, the proposal would have allowed Otis to unilaterally reduce/eliminate an employee's extra-contractual plus pay after notice and bargaining with the Union, subject to the parties' grievance/arbitration procedure. The Union rejected Otis' offer to bargain, stating that the proper time to submit such a proposal would be during the upcoming contract negotiations.

Otis and the Union began bargaining for the successor contract in March. The Union states that Otis submitted the same proposal on extra-contractual plus pay in March that it had previously submitted to the Union in November 2001. Eventually Otis, frustrated that the Union continued to propose the master contract, broke off negotiations at the end of March.

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[2] Prior to bargaining with KONE, the Union reached agreement with Thyssen-Krupp, another major employer in the elevator industry. The contract reached between the Union and Thyssen effectively became the industry master contract and was eventually signed by both KONE and Otis.

On May 20, prior to the parties' resumption of negotiations in June, Otis sent the Union five separate letters, each structured as a Memorandum of Agreement, complete with a signature line for the Union. One of the letters concerned extra-contractual plus pay and stated:

> As we are currently in negotiations, this letter will serve to advise the union of Otis' plans to review all cases where plus rates or rates that exceed those published in the agreement might exist.
>
> As a result of these reviews these rates may be continued or discontinued at management's discretion.
>
> Otis will establish internal controls and criteria on these types of rates after the new contract goes into place. Any rate that does not comply with these internal controls and criteria may be discontinued in the future.
>
> Any "plus rates" granted must be reviewed annually and reauthorized by the Company for payment. Any rate that has not been reauthorized will be discontinued.
>
> We are prepared to meet with you to discuss this matter at any time prior to the expiration of the current agreement.

The Union did not sign any of the five Memoranda of Agreement sent by Otis or respond to these letters in any way.

Subsequently, on May 29, Otis faxed the Union a letter identical to the May 20 Memorandum of Agreement regarding plus pay, but without the signature line for the Union. Although the parties were in regular phone contact during this time, they did not discuss Otis' May 29 letter.

When bargaining resumed on June 4, Otis raised the letters it sent the Union regarding extra-contractual plus pay. The Union responded, "we hear you and inform you that we didn't negotiate the plus rates and if you take them away we will go to the Department of Labor." The parties did not discuss the subject of plus pay again during the 2002 negotiations. Otis signed the industry master agreement on June 7.

III. Post-negotiation conduct

A. KONE

On June 28, approximately one month after signing the industry master agreement, KONE sent letters to the Local's Business Representative and approximately nine unit employees receiving plus pay in Kansas City, Missouri, asserting its right to unilaterally review and change plus pay rates. Although the letters contained signature lines, the Business Representative declined to sign the letter. Several days later, KONE sent the Local another letter, stating that, notwithstanding the Local's refusal to sign KONE's previous letter, it "reserve[d] the right to modify or discontinue extra-contractual rates for any individual at any time." In January 2003, KONE reduced the plus pay of one of the nine employees, allegedly because of economic reasons. Local 12 sent KONE a letter demanding that the change in plus pay be rescinded.

B. Otis

In November 2002, Otis sent a letter to every Union Local entitled, "Plus-Rate Assignment Review." The letter stated in part:

> Over the past 18 months the company has reviewed the number of situations where employees are paid at a rate above the negotiated rate for a local. These rates, referred to as "plus rates," have grown substantially and require review. In a number of cases, these rates have been continued even though the duties and responsibilities to which the higher rate applied are no longer in effect. To ensure these rates are used consistently we have deployed processes throughout Otis to evaluate and to put controls on the granting, continuation or reduction of these "plus rates."
>
> As we informed the Union during negotiations, local and regional management are presently engaged in a process of reviewing each circumstance in which an employee is being paid at a rate that is above the specified negotiated rates negotiated under the new labor contract to determine whether the plus rates will continue.
>
> …
>
> For any and all rates that might continue beyond this date, each case will then be reviewed on a periodic basis, and the Company will retain the right to increase, decrease, or eliminate the plus-rate at its sole discretion.

Some Union Locals objected to Otis' letter and demanded bargaining on the issue of plus pay, while other Locals did not respond.

In January 2003, Otis reduced or eliminated the plus pay rates of approximately 19 employees in various locations. In addition, Otis stated that in 2004 it would review the plus rates of those employees who continued to receive plus pay. These actions were communicated through letters to the affected employees and their respective Union Locals. In each case, the Union Locals protested the unilateral changes.

ACTION

We conclude that the Region should dismiss the charges, absent withdrawal, because the Union waived its right to bargain over the Employers' right to change employees' plus pay wages by refusing to bargain over the Employers' plus pay proposals.

I. The Union waived its right to bargain over the Employers' right to change plus pay wages

It is well-settled that a proposal involving merit pay is a mandatory subject of bargaining about which an employer has an obligation to bargain.[3] It is also clear that if a union receives timely notice that an employer intends to change a condition of employment it must request bargaining, rather than merely protest the employer's action, or it will be deemed to have waived the right to bargain over the change.[4] While the union's request need not take any

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[3] NLRB v. Katz, 369 U.S. 736, 745 (1962).

[4] See, e.g., AT&T Corp., 337 NLRB No. 105, slip op. at 4 (2002) (no violation where union protested employer's decision to close facility but did not use contractual procedures to challenge decision or follow up on its expressed intention to request bargaining); Kansas Education Assn., 275 NLRB 638, 639 (1985) (no violation where union protested change but only requested bargaining after implementation); City Hospital of East Liverpool, 234 NLRB 58, 58-59 (1978) (no violation where union filed grievance over unilateral change but did not request bargaining until after implementation); Clarkwood Corp., 233 NLRB 1172, 1172 (1977), enfd. mem. 586 F.2d 835 (3d Cir. 1978) (no violation where union only protested proposed changes); American Buslines, 164 NLRB 1055, 1055-56 (1967) (no violation where union only protested proposed change and filed ULP charge).

particular form,[5] it must be sufficient to put the employer on notice that the union desires to negotiate before the employer undertakes to implement the change. The only time the Board does not require the union to request bargaining is where the request would be futile because the employer presented the union with a fait accompli.[6]

In the instant case, although the parties never bargained over the Employers' unilateral right to grant plus pay to employees, their ability to do so exists by virtue of the parties' long-standing past practice. The Employers wished to establish greater control and consistency over the continuation of employees' plus pay, and thus sought bargaining with the Union over having the additional right to review and reduce plus pay rates. The Union's reaction to the Employers' plus pay proposals establishes, however, that it did not want the Employers to have the ability to change plus pay rates once granted. We conclude that in the circumstances of this case, the Union's actions constituted a refusal to bargain over the Employers' proposals; thus the Union waived its right to bargain over the plus pay issue, thereby privileging the Employers' unilateral changes in January 2003.

With regard to KONE, the Union's waiver is established by its silence in response to KONE's May letter noticing the Union that KONE intended to cease all plus pay at the expiration of the then-current collective-bargaining agreement. The Union failed to respond to KONE's notice, despite KONE's indication that it would be "pleased to meet with [the Union] to discuss this matter at any time prior to July 8, 2002." Thus, the Union's failure to respond to KONE's proposal, which cannot be characterized as a fait accompli, resulted in the Union's waiver of its right to

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[5] See Armour & Co., 280 NLRB 824, 828 (1986) (Board approved ALJ's finding that union's letter stating it "would like the opportunity to discuss with your company your position on [allocation of severance/vacation pay] prior to your plant closing in an attempt to eliminate or minimize any misunderstandings" was a request for bargaining over allocation of severance/vacation pay); Oak Rubber Co., 277 NLRB 1322, 1323 (1985), enf. denied mem. on other grounds 816 F.2d 681 (6th Cir. 1987) (Board approved ALJ's finding that a union's offer to "try and work out any problems which might prompt the Company to relocate" was a request for bargaining about decision to relocate).

[6] See National Car Rental System, 252 NLRB 159, 163 (1980), enfd. in relevant part 672 F.2d 1182 (3d Cir. 1982); J-B Enterprises, 237 NLRB 383, 387-88 (1978).

bargain over KONE's right to change plus pay rates in January 2003.[7]

The Union also waived its right to bargain over Otis' right to review and reduce plus pay rates, as evidenced by the Union's initial silence in response to Otis' notice of its intention to review plus pay rates, and by its subsequent refusal to bargain over the subject at the bargaining table. It is clear that the Union knew that Otis wished to have greater discretion in plus pay rates as early as 2000, when Otis settled the Union's 2000-2001 grievance agreeing to establish a "mutually agreeable" process for paying/changing plus pay rates. Otis also attempted to bargain with the Union over plus pay in November 2001, at which time the Union told Otis to wait until contract negotiations began. Finally, Otis' May letter to the Union, drafted in the form of a Memorandum of Agreement, constituted a bargaining proposal in which Otis sought the right to continue or discontinue plus pay rates at its discretion.

Although the Union knew of Otis' desire to bargain over plus pay rates, it remained silent in the face of Otis' initial Memorandum of Agreement proposal, and again when Otis submitted the proposal for the Union's review. In addition to its silence, moreover, the Union's later statement that, "we hear you and inform you that we didn't negotiate the plus rates and if you take them away we will go to the Department of Labor," demonstrated that the Union was refusing to bargain over the proposal. The Union's characterization of this statement as a rejection of the proposal, and a request to bargain over it, is not a reasonable interpretation of the statement, especially in

[7] KONE's notice to the Union was not presented as a fait accompli because of KONE's offer to bargain with the Union over its proposal, and because there is no evidence that KONE's decision to cease plus pay rates was irrevocable. Compare Ciba-Geigy Pharmaceuticals Division, 264 NLRB 1013, 1018 (1982), enfd. 722 F.2d 1120 (3d Cir. 1983) (union presented with fait accompli as employer intended to implement new program regardless of union's response and did so within hours of union's indication it needed time to review proposal) with AT&T Corp., above, slip op. at 4, 4 n.9 (employer's notice to union of intention to close facility not a fait accompli where notice presented more than two months before anticipated closure, parties' contract provided framework for addressing issue, and WARN notice itself suggested decision was not irrevocable).

light of the Union's previous silence.[8] Thus, the Union's response to Otis at the bargaining table, coupled with its previous silence, amounted to a refusal to bargain over Otis' proposal, and thus a waiver of its right to bargain over the issue when Otis changed plus rates in January 2003.[9]

Finally, we do not view the parties' contractual zipper clause as adversely affecting the Employers' ability to implement changes to plus pay rates. The current master agreement contains a zipper clause which states in part:

> This Agreement defines the entire relationship between the parties for the term of this Agreement and, except as herein specifically provided for, neither party shall during the term of this Agreement have any obligation to bargain with respect to any matter not covered by this Agreement nor concerning any change or addition hereto.

Because the parties' zipper clause is generally worded, it should not be construed in and of itself as a waiver of the parties' right to bargain over non-contractual pay practices.[10] Furthermore, the zipper clause remains unchanged from the parties' previous contracts, and there is no evidence that the parties intended it to affect plus pay rates.[11] In these circumstances, the zipper clause would

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[8] Compare Armour & Co., above, 280 NLRB at 828 ("sequence of events should have left little doubt in the mind of a reasonable person that the [u]nion was interested not only in ascertaining the position of [the employer], but also (if necessary) bargaining with [the employer] on the subject of allocation"); Show Industries, 312 NLRB 447, 453 (1993) (union's statement that it wanted to "do something" for employees after receiving notice that employer sold operation put employer on notice of union's desire to engage in effects bargaining); Oak Rubber Co., above, 277 NLRB at 1323 (union's offer to "try and work out any problems which might prompt the Company to relocate" was a request for bargaining).

[9] As with KONE, there is no evidence that Otis' proposal was presented to the Union as a fait accompli. See note 7, above.

[10] See Ohio Power Co., 317 NLRB 135, 136 (1995); Johnson-Bateman Co., 295 NLRB 180, 184 (1989).

[11] See Ohio Power Co., above, 317 NLRB at 136 (no contractual waiver of right to bargain where past practice existed under prior contracts containing same zipper clause, contract did

"freeze" the status quo regarding plus pay only if the subject had been consciously explored and yielded during the negotiations that resulted in agreeing to the zipper clause; here, the Union refused to negotiate over plus pay, so the subject was not explored by the parties with the Employers yielding their right to introduce it later.

II. McClatchy

Finally, we conclude that the Board's decision in McClatchy Newspapers[12] does not preclude the Employers' implementation of changes to plus pay rates. In McClatchy, the Board held that, absent good-faith bargaining over criteria and procedures, discretionary merit increase proposals fall into a narrow class of mandatory subjects that cannot be implemented after impasse.[13] The Board concluded that it would be antithetical to the collective-bargaining process to permit an employer to implement after impasse proposals giving it unlimited discretion over future pay increases without explicit standards or criteria in place.[14] The Board reasoned that the ongoing exclusion of the union from meaningful bargaining as to wage rates, which would be entirely within the employer's discretion, would impact all future negotiations on this key term of employment and would disparage the union by showing its complete incapacity to act as the employees' representative in this regard.[15] However, the Board also determined that nothing would preclude the employer from implementing a merit wage proposal if it had bargained to impasse or agreement with the union over definable objective procedures and criteria of how the merit wage system would operate.[16]

In the instant case, the Employers' unilateral changes to plus pay rates did not violate McClatchy principles.

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not mention past practice at issue, union maintained its position concerning practice, and parties did not intend zipper clause to abolish past practice).

[12] 321 NLRB 1386 (1996) (McClatchy II), enfd. 131 F.3d 1026 (D.C. Cir. 1997), cert. denied 524 U.S. 937 (1998).

[13] Id. at 1388, 1390. In McClatchy, the employer's proposal gave it the ongoing discretion to change wage rates, and provided no standards or criteria that would limit this broad managerial discretion. Id. at 1390-91.

[14] Ibid.

[15] Id. at 1391.

[16] Ibid.

Although the Employers sought greater discretion for reviewing and reducing plus pay rates, they nonetheless sought to bargain with the Union over their plus pay proposals and, implicitly or explicitly, over the procedures and criteria they would apply in reviewing plus pay. The Union's refusal to bargain with the Employers over their plus pay proposals precluded the Employers from bargaining over objective criteria and procedures that could be implemented to review and change plus pay rates. Thus, the Union's silent refusal to bargain over whether KONE had the right to change plus rates prevented KONE from ever bargaining with the Union over criteria and procedures.[17] The Union's refusal to bargain over Otis' proposal, which included a statement of intent to develop "internal controls and criteria" for evaluating plus pay rates, and was an explicit offer to bargain over procedures and criteria, also precluded the kind of bargaining which would have sufficed under McClatchy. Under these circumstances, McClatchy should not preclude the Employers' implementation of their proposals.

Accordingly, the Region should dismiss the charges, absent withdrawal, as the Employers did not violate Section 8(a)(1) and (5) by implementing changes to employees' plus pay rates in January 2003 due to the Union's waiver of its right to bargain with the Employers over this issue.

B.J.K.

[17] Notably, it appears that KONE did in fact apply objective criteria by reducing the plus pay of one employee for economic reasons.